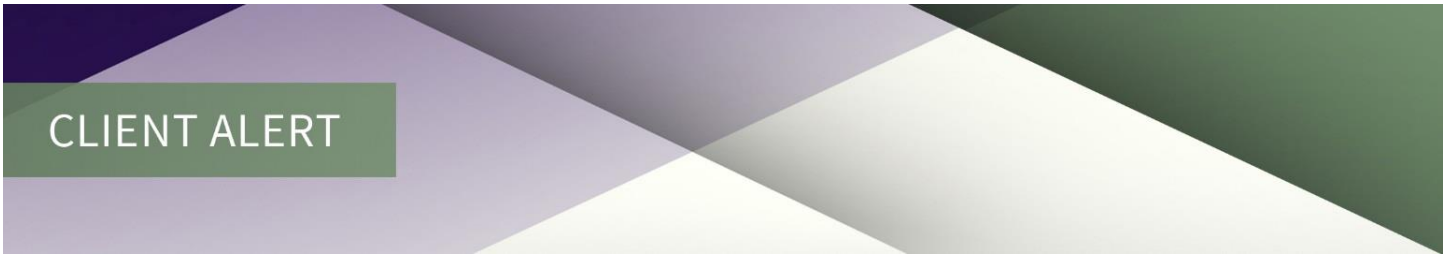

UK Competition Authority Imposes Highest-Ever Fine for "Gun-Jumping" Breach

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On 24 September 2019 the UK Competition and Markets Authority ("**CMA**") imposed a fine of £250,000 on PayPal, the California-headquartered supplier of payment services, for implementing its acquisition of iZettle in breach of an interim enforcement order ("**IEO**") which prohibited the integration of the parties' businesses pending the CMA's merger review. The fine is the largest ever imposed by the CMA for a single breach of an IEO.

The decision to impose the fine signals the strictness of the CMA's enforcement in relation to procedural violations by merger parties. In respect of global transactions, however, it also underscores the latent risks of a breach even if the CMA has granted the merger parties a limited derogation to the IEO to permit the integration of their businesses *outside* the UK. In such circumstances, the decision indicates that the CMA may enforce even in inadvertent breaches.

Merger of PayPal and iZettle

On 17 May 2018 PayPal announced an agreement to acquire Swedish mobile payments start-up iZettle for US$2.2 billion. Although PayPal did not seek merger clearance in the UK, the CMA contacted PayPal in July 2018 to discuss notification of the merger. While merger notifications to the CMA are voluntary, the CMA has the power to investigate mergers which have not been notified and to impose an IEO to prohibit integration of the businesses pending its investigation.

On the day prior to deal's closing, the CMA imposed on PayPal such an IEO, which prohibited the integration of the merger parties' businesses worldwide. However, in anticipation that the CMA would impose an IEO, on 12 September

2018 PayPal had submitted a request for a derogation and draft order to the CMA, in an effort to limit the scope of the IEO to the UK. The CMA issued the derogation order on the day following the imposition of the IEO.

PayPal then notified the merger on 28 September 2018. When PayPal did not offer remedies, the CMA opened an in-depth Phase II investigation which concluded in June 2019 with the CMA's final report. The CMA found that PayPal and iZettle would continue to face significant competitive constraints, including through customer switching and strong rivals, and cleared the deal unconditionally. However, the CMA's investigation of PayPal had not yet finished.

PayPal's breach of the IEO

During the course of its merger review, the CMA had identified certain concerns in the reports of the monitoring trustee which had been appointed to provide regular accounts of PayPal's compliance with the terms of the IEO. Although five derogation orders issued by the CMA between 20 September 2018 and 22 January 2019 successively narrowed the scope of the IEO, PayPal remained prohibited from integrating the two businesses in the UK.

The reports which the CMA received from the monitoring trustee indicated that PayPal had conducted three waves of cross-selling pilot marketing campaigns in France and Germany to promote iZettle products to existing PayPal customers. In a sample test of the customers contacted, however, the monitoring trustee identified that 76 (out of 221) of the customers also maintained a UK online presence (of which 16 also maintained an UK offline presence).

The CMA concluded that PayPal had breached the IEO, finding that in the UK PayPal's conduct: (i) impaired the ability of PayPal and iZettle to compete independently; (ii) risked undermining the separate sales or brand identities of the merger parties; and (iii) failed to operate their customer lists separately. Furthermore, as the precautionary purpose of the IEO was to protect against even the *possibility* of prejudice to the CMA's investigation, the IEO was not limited to actual prejudice.

Country-specific marketing

On that basis, the fact that the landing pages provided by the link in PayPal's marketing emails were in French or German, while relevant to assessing the seriousness of the breach and the level of any penalty, were considered irrelevant to establishing the existence of a breach. The CMA considered the fact that the French or German customers contacted were part of a business which had a UK presence was sufficient to raise the possibility of prejudice to the CMA's investigation.

No materiality threshold

The CMA also relied on judgments of the UK Competition Appeal Tribunal in rejecting PayPal's submissions that (i) the CMA, even within the scope of *possible* harm, should apply a materiality threshold; and (ii) the possibility of harm to

competition in the UK (stemming from the cross-selling pilot marketing campaigns in France and in Germany) was too remote. The CMA rejected both submissions and stated that the risk of harm should have been obvious to PayPal.

Wider enforcement trends

United Kingdom

The infringement decision in relation to *PayPal/iZettle* is the CMA's sixth decision concerning "gun-jumping" since 2018, and has expanded the forms of enforcement risk for merger parties. Fines in prior cases had related to redeploying staff and equipment between the merger parties' businesses, terminating commercial leases, appointing directors to the other party's board, making or receiving payments on the other party's behalf, and selling each other's products.

The *amount* of the fine also forms part of a trend, as was signalled by the CMA in its recent guidance. Published in June 2019, the guidance stated that although penalties in relation to breaches of IEOs have been significantly less than the 5% cap, "*given the importance of Interim Measures to the functioning of the regime, the CMA will not hesitate to make **full** use of its fining powers. The CMA will therefore impose proportionately larger penalties in future cases*…".

Such guidance also recalled the risk of *personal* liability for any individual who signs a compliance statement (which the merger parties that are subject to an IEO must periodically provide the CMA), and thereby knowingly or recklessly supplies the CMA with information which is false or misleading in any material respect. A person convicted of such a breach may be imprisoned for a term not exceeding two years, ordered to pay fines, or both.

Finally, the record fine was imposed in the same year as the CMA's first use of the power to order, during an ongoing merger investigation, the reversal of pre-closing integration by merger parties. The CMA and its predecessor agency, the Office of Fair Trading, had previously ordered the unwinding of completed mergers after an in-depth Phase II investigation, but until February 2019 had not issued an order to restore pre-merger conditions of competition in a pending review.

Europe

Enforcement action in relation to gun-jumping has also been increasing elsewhere in Europe and has become the subject of multiple judicial appeals. For example, we have examined the French competition authority's decision in relation to Altice in a previous briefing.

In July 2018, the German Federal Court of Justice confirmed an interim order which had been issued in relation to *Edeka/Tengelmann* in 2014 by the German competition authority at the outset of its merger review. The authority considered that the implementation of a framework agreement, which the merger parties had agreed in parallel with their

merger agreement, would constitute gun-jumping and would also violate Article 1 ARC, which prohibits anticompetitive agreements.

At issue was the extensive cooperation for which the framework agreement provided, through joint purchasing and joint invoicing by the parties, in the context of a proposed merger between them which the German competition authority ultimately prohibited.

In its judgment, the German Federal Court of Justice upheld the authority's assessment and found that even agreements which do not fully implement a transaction can constitute gun-jumping, *provided* that the steps which are undertaken by the parties would be difficult to undo if the transaction did not take place. Moreover, the court held, in order to issue an interim order, it is not necessary that the gun-jumping *has* taken place: it is simply necessary that there should be a credible threat that it *might* take place, which the court concluded was the case on the facts.

The German Federal Court of Justice also focused on distinguishing its judgment from the judgment of the Court of Justice of the EU (**"CJEU"**) in *Ernst & Young*, which had been delivered only a month earlier. The German Federal Court held that the scope of the rules which apply to German merger control is wider than the scope of the corresponding provisions of the EU Merger Regulation, and thus might apply to conduct which might not necessarily be caught by the latter.

The judgment highlights the challenges inherent in multi-jurisdictional merger control proceedings, in which the level of integration permitted by the rules can differ significantly between regimes. In *Ernst & Young*, for example, the CJEU had held that only a change of control, or steps which are necessary to it, over the target could amount to a breach of the standstill obligation in relation to transactions reviewed by the European Commission (**"Commission"**).

Other recent cases before the CJEU have focused on the level of the fines which are imposed by the Commission on merger parties which it considers have breached the standstill obligation. For example, on 26 September 2019, Advocate General Evgeni Tanchev advised the CJEU to set aside a fine of €10 million imposed on Marine Harvest, on whom the Commission had also imposed a fine of €10 million for failure to notify. In his view, the *former* should be subsumed into the *latter*.

If the CJEU follows the Advocate General's non-binding opinion, the judgment in relation to Marine Harvest might be expected to have an even greater impact on the ongoing proceedings before the General Court of the EU (**"GCEU"**) in relation to fines imposed by the Commission on Altice. As we examined in a previous briefing, the Commission imposed on Altice a fine of €62.25 million for gun-jumping alongside a fine of €62.25 million for failure to notify.

The forthcoming judgments of the CJEU and of the GCEU may offer a focal point for national competition authorities to align certain elements of their enforcement practices in relation to gun-jumping, including in ongoing investigations, such

as the Portuguese competition authority's investigation of HCapital. They may also have an impact in jurisdictions which impose individual liability, such as Ireland, which brought its first criminal prosecutions for gun-jumping in 2019.

United States

In a previous briefing, we examined a recent consent judgment imposing a civil penalty in relation to an acquisition by Canon, for a failure to file a timely Hart-Scott-Rodino notification. In the press release accompanying the settlement in June 2019, FTC Commissioner Bruce Hoffman promised that the FTC would be "*vigilant in seeking relief against attempts to circumvent the HSR Act's filing requirements*". Such language reflects the priority given to enhanced enforcement by the UK's guidance (see above), published in the same month.

Practical considerations for merger parties

Given this enforcement trend, it is essential for companies to include sound antitrust safeguards in their due diligence processes, transaction agreements, and integration planning. Companies should in particular be aware of the issues discussed and guidance provided below. In each case, however, merger parties should consult their antitrust advisors in respect of the rules applicable in the jurisdictions that their transaction may concern.

- Information exchange between the parties. It is clearly legitimate for a purchaser to undertake due diligence into the target's affairs to determine whether to proceed with an acquisition and at what value. However, it is important that any due diligence assessment be structured so as to ensure that commercially sensitive information is effectively ring-fenced to the buyer's deal team and not shared with the buyer's commercial teams. To this end, the use of "clean team" arrangements is fairly standard. The following information is typically particularly sensitive: customer details, specific and current prices and supply terms, margins, planned marketing campaigns, pending bidding processes and R&D and innovation projects. In certain cases, particularly sensitive information may be shared only with the merger parties' "outside advisors" under a "black box" procedure. The advisors can then report back on their analysis in an appropriate manner by means of a high-level summary which aggregates and anonymises the data reviewed by them. Antitrust counsel should be closely involved throughout this process.

- Antitrust clearances as a condition to closing. It is customary that the closing of transactions be conditional upon having obtained (at least) all required mandatory and suspensory merger control consents. However, it is important to note that the standstill obligation under the EU merger control regime (and similar regimes) applies irrespective of the terms of any transaction documents. Furthermore, barriers to closing can arise even in jurisdictions in which merger parties are not, in the absence of an IEO (or similar order), precluded from integrating the businesses, if the deal raises concerns for competition authorities. Parties must therefore carefully consider issues such as a possible long-stop date for obtaining clearances and the desirability of agreeing a break-fee if clearances are not obtained. Where parties fail to identify a mandatory clearance, the clearance is not

obtained in a timely manner, or an interim order continues to prohibit closing pending a merger review, the resulting unwinding of the transaction can be complex and costly. The appropriate deal terms and due diligence arrangements must always reflect the specific circumstances of each deal, and bespoke solutions are therefore required in each case.

- Management of the target between signing and closing. The buyer has a significant legitimate interest to ensure that the target's value is not diminished in the period between signing and closing. However, at the same time, the target must continue to conduct its business independently and may not be directed or influenced by the buyer when determining its ordinary-course commercial activities. It is customary that merger parties negotiate covenants which provide for a corridor for commercial behaviour of the target that ensures the target maintains its value. In doing so, the parties should take great care with respect to the structure of those covenants and, in particular, to the scope of the buyer's positive consent or negative veto rights. These must not go beyond what is strictly necessary to preserve the value of the target and must not interfere with the target's ability to conduct its activities in the ordinary course. Otherwise, there is a risk that the company will be regarded as having implemented the transaction prematurely, *i.e.* "jumped the gun". There is also a clear red antitrust line: hard-core cartel conduct, such as agreement on sales prices, joint bidding, joint marketing, limitation of output or capacity, as well as joint purchasing, where it would be illegal in light of the parties' competitive position, will never be allowed prior to merger clearance (and, arguably, completion).

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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